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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 354

H. V. HICKINBOTHAM ..... *Petitioner*

v.

A. B. CORDER, *et al* ..... *Respondents*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the Supreme Court of Arkansas sought to be reviewed by the petition for writ of certiorari is printed as an appendix to the petition for certiorari in pages 11 to 23.

JURISDICTION

Petitioner seeks to review the action of the Supreme Court of Arkansas in affirming a decree of injunction issued by the Chancery Court of Pulaski County on October 8, 1956. Re-hearing was denied by the Supreme Court of Arkansas on May 13, 1957.

QUESTIONS PRESENTED

The petition allegedly presents three questions to this court for its decision. Properly stated these questions are:

(1)

Whether a municipal ordinance requiring grocery stores to remain closed on Sunday is violative of the Constitution of the United States.

(2)

Whether this Court will grant certiorari to review a decision of a State Supreme Court, upholding the power of a state court of equity to enjoin the violation of a city ordinance prohibiting the opening of grocery stores on Sunday, on petition of citizens who allege a nuisance and a special damage, where there has been a continuous, studied and open defiance of the law.

(3)

Whether this Court will grant certiorari to review the sufficiency of evidence of special damage to petitioners to sustain a decree of the State Chancery Court enjoining the violation of a city ordinance as a nuisance, which decree has been upheld by the State Supreme Court.

CONSTITUTIONAL PROVISION INVOLVED

Petitioner alleges that the case involves Amendment 14 to the Constitution of the United States, which the respondent vigorously denies.

STATEMENT OF THE CASE

The City of Little Rock enacted its Ordinance 10206 prohibiting the operation of all grocery stores within the City on Sunday. The ordinance was made applicable to the entire class. It contained a penalty for its violation of a fine from $25.00 to $100.00. The petitioner, who operates a large grocery and market, defied the ordinance and remained open on Sundays, although arrested on each occasion. The respondents, owners and operators of grocery stores in the City of Little Rock, lawfully obeyed the terms of the ordinance. They filed their petition for an injunction to restrain the petitioner from further violation of the ordinance, alleging that the repeated violation by petitioner constituted a nuisance; that the penalty of the ordinance did not deter violation; and alleging further that their property rights were being severely damaged by the action of the petitioner herein. Upon trial of the case the lower court found that respondents herein were suffering special monetary damage by the actions of the petitioner herein, and that the amount of the penalty in the ordinance was not sufficient to deter violation thereof. Notwithstanding the decree of the Chancery Court issuing the injunction, the petitioner herein continued his open defiance of both the law and the Court order of injunction. He was fined for contempt, which fine for contempt was affirmed by the Arkansas Supreme Court. He sought certiorari in this Honorable Court to reverse the judgment of affirmance on the theory that the ordinance was unconstitutional, just as he presents in the case at bar. This Court denied certiorari May 13, 1957, the case being *Hickinbotham v. Williams*, No. 923, October term 1956. The Arkansas Supreme Court also affirmed the decree of the lower court in granting the injunction, which action of the Arkansas Supreme Court is sought to be reviewed here.

ARGUMENT

I

A Municipal Ordinance Requiring Grocery Stores to Remain Closed on Sunday Is Not Violative of the Constitution of the United States.

The question presented here has previously been decided by this Court, having been presented by the petitioner in this term of court. On May 13, 1957, this Court denied certiorari to the petitioner herein in Case No. 923, *H. V. Hickinbotham* v. *Guy E. Williams, Chancellor*, 1 L. ed. (2d) 909. The federal question allegedly presented in that petition was whether or not the identical ordinance involved in the present petition was violative of the Federal Constitution. Furthermore, an almost identical ordinance was involved in the petition for certiorari denied November 5, 1956, in the case of *Berlon S. Taylor* v. *City of Pine Bluff, Arkansas*, No. 324, 1 L. ed. (2d) 85. In that case counsel for petitioner in the present case sought certiorari based upon the same contention as presented in the case at bar. This Court has previously held that ordinance requiring grocery stores to remain closed on Sunday are not violative of the Constitution of the United States.

Towery v. *North Carolina*, 79 S. E. 2d 513; Appeal dismissed for want of a federal question; 347 U. S. 925, 98 L. ed. 1079.

Petit v. *Minnesota*, 177 U. S. 163, 44 L. ed. 716.

Soon Hing v. *Crowley*, 113 U. S. 708, 28 L. ed. 1145.

II

The Question of Whether the State Equity Court Has Jurisdiction to Enjoin Involves No Federal Question

Petitioner seeks certiorari to determine whether or not the State Equity Court had jurisdiction to enjoin acts which

constitute a nuisance, but which acts are also punishable as crimes. This Court has many times held that whether a particular remedy lies in equity or law in a state court, is a matter dependent entirely upon local law and involves no federal question whatever.

Loeber v. *Schroeder*, 149 U. S. 580, 37 L. ed. 856.

Smith v. *Adsit*, 21 L. ed. 310; 83 U. S. 185.

Thorington v. *City Council of Montgomery*, 147 U. S. 486; 37 L. ed. 252.

Honeyman v. *Honan*, 302 U. S. 375, L. ed. 312.

Petitioner does not allege that he has been denied a trial. He merely alleges that equity has no jurisdiction to enjoin criminal acts. For many years, reflected by the State Court's opinion in this case, equity courts have enjoined criminal acts under certain circumstances. The State Court found that the present case was an appropriate one for the exercise of the injunctive power, which decision of the lower court was affirmed by the State Supreme Court. This being purely a matter of local law, it is submitted that no federal question is presented for determination here.

III

Certiorari Will Not Lie to Review the Sufficiency of Evidence Upon Which a State Court's Decree Is Based in a Factual Case.

The petitioner seeks certiorari to review the sufficiency of the evidence in the lower court, which evidence that court found showed a special damage to the plaintiffs below, and which showed that the acts of the petitioner herein constituted a nuisance. Petitioner argues that the evidence was not sufficient to justify the holding that the plaintiffs below had actually suffered a damage; that the evidence only showed that petitioner's keeping his store open on

Sunday was unfair competition. This Court has many times held that it will not grant certiorari to review evidence only, or to discuss specific facts.

U. S. v. *James J. Johnston*, 268 U. S. 226, 69 L. ed. 925.

Southern Power Co. v. *No. Carolina Pulaski Service Co.*, 263 U. S. 507, 68 L. ed. 413.

Whitney v. *California*, 274 U. S. 357, 71 L. ed. 1095.

Milkwagon Drivers Union of Chicago v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, 85 L. ed. 836.

CONCLUSION

The petitioner herein has presented no substantial federal question, nor has he presented any question of sufficient importance and significance to justify the Court in granting his petition. There is no conflict in authority presented by the petition. What we have is merely the third attempt in this Honorable Court to review the validity of an Arkansas municipal ordinance prohibiting grocery stores from remaining open on Sunday. There is no contention that the ordinance is not applicable to all in the class, the principal contention being that sufficient evidence was not introduced to justify the holding of the lower courts.

It is respectfully submitted that the petition for writ of certiorari should be denied.

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